

1 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

2 **In the matter of**
3 **Appeal of Due Process Level I Decision**
4 **by**
5 **S. C. (minor),**
6 **Petitioner/Appellant,**
7 **-v-**
8 **WASHINGTON ELEMENTARY**
9 **SCHOOL DISTRICT,**
10 **Respondent.**

Docket No. 02F-II0008-ADE

 DECISION AND ORDER OF
 ADMINISTRATIVE LAW JUDGE
 IN LEVEL II APPEAL

11 This is a final administrative appeal brought by Appellant S. C. (“Student” or
12 “Petitioner”) through his mother (“Parent”), for review of two portions of the February 15,
13 2002 Due Process Hearing Officer's decision.

14 Pursuant to Arizona Revised Statutes (A.R.S.) §§41-1092.01(E) and 41-1092.02,
15 the Arizona Department of Education referred this matter, and the Level I record, to the
16 Office of Administrative Hearings for the final Level II administrative appeal review as
17 provided in Arizona Administrative Code (A.A.C.) R7-2-405(J). ADOE completed its
18 filing of the remaining Level I documents in this matter on March 19, 2002.

19 The law governing these due process proceedings is the Individuals with
20 Disabilities Education Act (“IDEA”), 20 U.S.C. §1400 *et seq.* (as re-authorized and
21 amended in 1997), and its implementing regulations, 34 C.F.R. Part 300, as well as the
22 Arizona Special Education statutes, A.R.S. §§15-761 *et seq.*, and the implementing
23 rules, A.A.C. R7-2-401 through R7-2-408.

24 Parent represented Student in this proceeding. Sandra J. Creta, Esq. of Quarles
25 & Brady Streich Lang LLP represented the Respondent Washington Elementary School
26 District (“District”).

27 Parent initiated the due process procedure from which this appeal arises by filing
28 the due process request of November 21, 2001 (revised as of November 26, 2001).
29 The due process request was further refined through pre-Level I hearing conferences
30 with the Due Process Hearing Officer and the parties. Due Process Hearing Officer
 Edward E. Vance (“Hearing Officer”) set forth the finalized due process issues

1
2 numbered 1 through 6 in the Due Process Hearing Officer's Decision ("Decision") on
3 pages 2 and 3.

4 The Hearing Officer issued his Decision on February 15, 2002. As to one portion
5 of issue number 1, the Hearing Officer found that the District had failed to comply with
6 IDEA as to one element of the Student's IEP implementation [provision of the one-on-
7 one aide for approximately three months] and awarded fifty hours of compensatory
8 education [one-on-one tutoring services]. However, as to the remaining portions of
9 issue number 1, the Hearing Officer found that the parties essentially disagreed with
10 each other on those due process issues raised, and determined that the District had
11 complied with the IDEA [providing individualized specialized instruction in compliance
12 with Student's IEP].

13 The Hearing Officer found that issue number three was moot [the test requested
14 by Parent having already been performed]. The Hearing Officer found in favor of the
15 District on the remaining issues: numbers 2, 4, 5 and 6. Student filed a timely appeal on
16 March 15, 2002.

17 Student's appeal indicated that the appeal consisted of two issues – indicating the
18 issues to be number 4 and number 5, as had been set forth in the Decision. Student's
19 appeal states:

- 20 1. Classroom criteria moves children to earn out class, in special education a
21 movement of placement is a team decision. Curriculum standards that are
22 earn out for classes violate the IDEA, for placement changes.
23 2. I have requested S. to have a Science class in regular setting and was
24 denied due to the classroom criteria of earns out program."
25

26 Pursuant to the Petitioner's appeal, the Administrative Law Judge issued an
27 ORDER for Level II appeal briefs from the parties. The Administrative Law Judge
28 ordered that the record would close two weeks after the final Reply brief due date and
29 that the thirty day review period mandated by A.A.C. R7-2-405(21) would begin on May
30 31, 2002.

1
2 The Administrative Law Judge reviewed the extensive record consisting of the
3 hearing record compiled by the Hearing Officer (hearing process of the Level I matter,
4 and the exhibits admitted into the record at Level I hearing), the four volumes of hearing
5 transcripts, the Decision, and the appeal and appeal briefs.

6 **Standard of Review**

7 This is a final administrative hearing appeal. Both federal and state law require
8 that the Level II reviewer "make an independent decision". 20 U.S.C. §1415(g) (1998
9 Supp.); A.A.C. R7-2-405(21)(b)(v). The Level II reviewer may exercise non-deferential
10 review, except that deference will be given to findings of a hearing officer based on
11 credibility judgments. *Carlisle Area School v. Scott P.*, 62 F.3d 520, 529 (3d Cir. 1995).
12 However, deference will be given to the administrative findings of the Hearing Officer
13 when the findings are carefully constructed and thorough, as they are in this case.
14 Nevertheless, this appeals tribunal is not bound by a hearing officer's factual or legal
15 conclusions.

16 Having reviewed and considered the record of the Level I Due Process hearing,
17 Petitioner's Appeal and Appeal Brief, Respondent's Response and Petitioner's Reply,
18 the Administrative Law Judge makes the following Decision and Order affirming the
19 Hearing Officer's Decision from the Level I due process hearing.

20 **DECISION**

21 ISSUES ON APPEAL

22 The Hearing Office specified the two due process issues, now on appeal, as
23 follows, in the Decision:

- 24 4. Did the District comply with IDEA requirements for change in placement
25 regarding the curriculum standards, "earn out of class", and 7th grade final placement?
26 5. Is Student's science class the least restrictive environment for Student?
27

28 The Hearing Officer found in favor of the District on issue numbers 4 and 5.
29 Petitioner appeals the determination as to issue number 4, indicating that curriculum
30 standards that have an "earn out for classes" violate the IDEA with regard to placement
changes. Petitioner appeals the determination as to issue number 5, indicating that her

request to have S. take science class in a regular setting was denied “due to the classroom criteria of earns out program”.

ARGUMENTS

Petitioner essentially argues the same thing on both issues – that the “earn out” for a class violates IDEA and that “earn out” (and the District) prevents Student from being mainstreamed. Petitioner argues that the District is detouring Student from science class, segregating him from other peers and denying him integration. Petitioner argues there has been no attempt by the school to consider mainstreaming him into (regular) science class. Petitioner argues that with the one-on-one aide for behavioral situations, providing Student with a “least restrictive environment should not have been a problem to work with him, to modify the curriculum.” Opening Brief, page 2. Petitioner argues that 20 U.S.C. §1414 requires the District to meet the child’s needs to enable the child to be involved in and progress in the general curriculum, to participate with other children with and without disabilities in extracurricular and nonacademic activities, and to specially design instruction to meet the unique needs of Student. Petitioner asks that Student have “services that he should have been given in LRE, Science but also a regular science class throughout the semester breaks to compensate.” Opening Brief, page 3 and 4.

Petitioner argues that Student needs interaction with other children and argues that “it is time to move pass these issues to integrate him back into a regular classroom setting” and indicates that 20 U.S.C. §1415(j)(i) and (ii) call for “an appropriate interim alternative educational setting.” Opening Brief, page 6. Petitioner argues that the “earn out” provision is discriminatory, and that children with disabilities should not have to earn out a class. Petitioner argues that placement changes are a team decision, not subjective for a teacher to decide whether a child has had “good behavior for 15 days in a row.” Petitioner argues that the self contained class, with the “earn out” provision excludes participation of disabled students based solely on their disability and in violation of Section 504. Opening Brief, page 8.

Respondent District argues that Petitioner’s appeal should be denied because Petitioner has failed to show that the District had not fully complied with IDEA requirements on changes in placement and because Petitioner has failed to show that

1
2 the District had not placed Student in the least restrictive environment for science class.
3 The District argued that the record demonstrates its Cross Categorical Behavioral
4 ["CCB"] self contained class was, in fact, the least restrictive environment for Student.

5 Petitioner's Reply reiterates the appeal issues. In the Reply, Petitioner primarily
6 presents considerations which are more appropriate for the IEP team regarding Parent's
7 desires for modifications to the IEP while agreeing and advocating that Student has
8 made progress under the IEP with the level of supportive assistance provided therein.
9 Petitioner argues that "all other students in school don't have to "Earn Out" and that
10 placing a student in a learning disabled class should not be done through "Earning Our
11 Class." Reply, page 3. Petitioner argues that this [inference, placement in a learning
12 disabled class] requires a team decision. Petitioner argues that the "earn out" class
13 should be changed to a point system. Petitioner essentially argues that modifications
14 and regular class should be tried. Petitioner finally argues that Parent received the
15 District's Response in the mail on May 2, 2002 rather than on the due date of April 30,
16 2002.

17 CONSIDERATIONS

18 1. The record clearly demonstrates that the District has developed an extensive
19 and specifically detailed 32 page Individualized Education Program ("IEP") for Student
20 based on his diagnosed and demonstrated disorders and emotional and learning
21 disabilities. IEP of April 2001, District exhibit D-1. The record further demonstrates that
22 Parent has been an active and regular participant in the IEP team meetings, advocating
23 for Student and for continued progression of Student.

24 2. Generally, pursuant to the existing IEP, Student's specific curriculum is, in
25 fact, modified and individualized to his abilities and for progression to the stated IEP
26 goals. Additionally, under the IEP, Student has been assigned a one-on-one aide to
27 work with Student at all times and to help Student understand and comprehend
28 directions, to help Student stay focused on educational task and to help Student
29 manage his own behavior. The District is responsible for providing the Student with
30 special education pursuant to its determined appropriate methodology. See *Board of
Education v. Rowley*, 458 U.S. 176, 208 (1982). In this case, the Hearing Officer
determined that Parent presented no evidence that the District's methodology was

1
2 inappropriate in any way. Decision, page 14. Likewise, Petitioner's appeal presents no
3 evidence of inappropriate methodology. Parent simply disagrees with the methodology,
4 but only as to science class.

5 3. Student's IEP provides for Student's least restrictive environment to be
6 placement in the CCB classroom. Any District proposal for a change in that placement
7 would require prior notice to the Parent incorporating all procedural safeguards. No
8 placement change is being proposed by the District at this time. Parent is simply
9 arguing that there should be a change.

10 4. Although having implemented the existing IEP and its addendums and the
11 Stipulation Settlement on some due process issues, Parent continues to disagree with
12 some aspects of the IEP and continues to question the provisions as has been her
13 pattern of disagreements. Although the transition plan in the IEP has been successful
14 for Student to make progress at the current middle school, Parent now disagrees that
15 CCB and its programs are appropriate for Student. However, it must be noted, again,
16 that the disagreement is only as to Parent's request to mainstream Student for science
17 class. No other class is mentioned in the appeal issue. Parent objects to the "Make
18 Your Day" program, which is the "earn out" provision for students in CCB, however,
19 Parent presented no factual or documentary evidence that the CCB with its earn out
20 program is in violation of IDEA.

21 5. The IEP assessment for Student's present level of educational performance
22 clearly indicates that Student qualifies for learning disability services in all academic
23 areas [listing therein: math, reading and written language]. The assessment further
24 states that Student currently receives (educational) services in self-contained
25 classrooms and that earn-out classes "would need to be serviced in LD Resource."

26 6. The IEP assessment for Student's present level of behavioral functioning
27 clearly sets forth significant affective reactivity, cognitive distortion, behavioral triggers
28 and behavioral reinforcements taken into account in determining Student's curriculum
29 instruction structure.

30 7. Student's IEP contains three plus pages of behavioral intervention plans. IEP,
pages 11 through 14 of 32.

1
2 8. Student's IEP contains seven pages of short term objectives and benchmarks,
3 breaking down in detail the goals and measurements of educational progression. IEP,
4 pages 17 through 23 of 32.

5 9. Student's IEP specifically notes that participation in regular education, extra
6 curricular and nonacademic activities is earned by demonstrating appropriate behaviors
7 consistent with IEP parameters and proposed classroom behavior structure. IEP, page
8 28 of 32.

9 10. Appropriate placement considers the following factors: (1) the educational
10 benefits of a regular classroom; (2) the non-academic benefits of interaction with
11 nondisabled children; (3) the effects of the student's presence on the teacher and the
12 other children in the regular classroom; and (4) the cost of mainstreaming the student in
13 the regular classroom. *Sacramento City Unified School District, Board of Education v.*
14 *Rachel H.*, 14 F.3d 1398, 1400 (9th Cir. 1994). Given the weight of the evidence and
15 testimony considered by the Hearing Officer in Level I as to Student's history and
16 progress and the extensive detailed IEP, the current CCB classroom is the least
17 restrictive environment placement and is the appropriate placement for Student at this
18 time.

19 **DECISION**

20 1. Based on the Level I hearing record, the appeal and the appeal briefs, the
21 Hearing Officer's Decision is determined to be well reasoned and appropriate under the
22 current and applicable law.

23 2. Based on the Level I hearing record, the appeal and the appeal briefs, the
24 Hearing Officer's Decision shall be affirmed.
25

26 ///

27 ///

1
2
3 **ORDER**

4 Based on the foregoing,

5 The Due Process Hearing Officer's February 15, 2002 Decision and Order is
6 AFFIRMED, and Petitioner's appeal is Denied.

7 This Decision and Order of the Administrative Law Judge is the final Level II
8 administrative appeal in the matter, and any party aggrieved by this Decision and Order
9 of the Administrative Law Judge has a right to, and may seek, judicial review. Arizona
10 Administrative Code R7-2-405(22).

11 ORDERED and DATED this 28th day of June, 2002.

12
13

Kay A. Abramsohn
14 Administrative Law Judge
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

Copy sent by Certified mail 7000 1670 0011 5254 3505
this ____ day of July, 2002, to:

S. C.
c/o Ms. S. C.
15040 North 27th Drive
Phoenix, AZ 85053
Petitioner

Copy sent by Certified mail 7000 1670 0011 5254 3512
this ____ day of July, 2002, to:

Washington Elementary School District
ATTN: Dr. Craig Carter
8610 North 19th Avenue
Phoenix, AZ 85021
Respondent

Copy mailed
this ____ day of July, 2002, to:

Sandra J. Creta, Esq.
Quarles & Brady Streich Lang LLP
Two North Central Avenue
Phoenix, AZ 85004-2391
Counsel for Respondent

Steven Mishlove, Associate State Director
Arizona Department of Education
ATTN: Theresa Schambach
1535 West Jefferson
Phoenix, AZ 85007

By _____